Norms matter

Norms Matter: A Legal Perspective on Political Islam and State Power in North Africa

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Abstract

The prevalence and position of Islamic political parties has increased since the Arab Spring. Though there has been much analysis on the role and ideologies of these parties little has been focused on their position and engagement in law-making and therefore their impact on state-society relations. This paper analyses the role of such parties as law-makers, focusing on how such parties engage and impact law making and how they utilize Islamic normative traditions. It will provide evidence from core examples including the right to life and the death penalty and the rights of secession of property after death.

Keywords: Norms, Islam, the State, MENA, law-making, Islamic law

Introduction

The Arab Spring has led to unprecedented access to positions of state power by parties tied to political Islam throughout North Africa.[1] Through the ballot box, they have acquired significant bearing, even control, over high-profile national state institutions such as the government,[2] legislature,[3] presidency[4] or constituent bodies.[5] All of these parties, to different extents, have engaged in lawmaking, as law stands as one of the, if not the, form of the modern state's power over society.[6] Law enables one to identify the state from other political organisations, justify its power, and organise

[1] The Libyan, Muslim Brotherhood inspired, Justice and Construction Party has had significant power over the legislature, constituent initiatives and government that followed Khadhafi overthrown. However the territorial capacities of these institutions lead to question the significance of LJC's law-making endeavor. From a practical viewpoint, sources on Libya are also less abundant than on Morocco, Tunisia or Egypt.

[2] Since 2011, Morocco's governments are headed by a Justice and Development Party's prime minister, Abdel-Ilah Benkiran and then Saad Dine el Otmani. Since the Revolution, Ennahdha has been part to all Tunisian's government. The Egyptian Freedom and Justice Party of the Muslim Brotherhood was the strongest force in the Quandil's government which lasted from August 2012 to July 2013.

[3] The Moroccan's Justice and Development Party won the highest seats in both general election of 2011 and 2016. With the exception of the 2014's poll, where it finished second, it has been also the case for Ennahdha. In Egypt, the Freedom and Justice Party and the Salafist, Nour Party, won almost three quarters of the seats in the 2011-2012 general elections.

[4] Mohamed Morsi, Egyptian president from July 2012 to 2013, came from the Muslim Brotherhood.

[5] Ennahdha was the strongest political force in the Tunisian constituent assembly which lasted from 2012 to 2014. As for the Freedom and Justice Party and Nour Party in Egypt, they were the driving forces behind the passing of the December 25 2012 Constitution.

[6] Neil MacCormick, *Questioning Sovereignty : Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 17-26. These authors have even came to identify law and the state: Norberto Bobbio, *Teoria Dell'ordinamento Giuridico*, (Turin, 1960); Hans Kelsen, transl. Max Knight, *Pure Theory of Law*, (Berkely: University of California Press, 1970); Michel Troper, *Pour Une théorie Juridique De L'Etat*, (Paris: Presses Universitaires De France, 1994).

its different institutional components and to communicate behavioral expectations to the population. Nevertheless, lawmaking, as a distinctive political practice with a degree of internalised logic, appears to not have been examined seriously by the literature on political Islam in the region. Nor has said literature questioned to what extent passing law could impact the state's functioning as well as society.[7] In these works, Islamist political parties' actions in lawmaking appear determined by national[8] or international[9] factors external to the activity, and the content of their legal proposals is not worth looking at in itself or as elements tied to a broader legal system, but rather as a mere indicator of something else, such as parties[10] or members[11] ideology or positioning within the political system.[12]

In contrast to the works above, this paper intends to take lawmaking seriously to better understand how these parties engage in the activity and to ascertain what is concretely at stake for state and society. To achieve these ends, this paper will utilise the analytical tools of legal theory which will serve as an effective prism to assess how law operates as a technology of the state's organisation and power. The focus will be on legal dispositions deemed key in characterising distinctively political Islam's ideology on the assumption of their ties with the Islamic normative tradition. The latter is understood broadly and encompasses: 1) ethical ideas about politics, such as references to compliance with Shariah; 2) institutions of normative production and interpretation, such as ulama; 3) social areas that the Islamic normative tradition has traditionally aimed at regulating. The ambition is to rely on a taxonomy of norms proposed by legal theory to analyse the content of Islamists legal propositions, with the aim of not merely classifying but also of bringing a practical outlook on the lawmaking activities of these actors. This practical outlook will be first exterior to parties' activities, as it will study the impact of Islamist's legal propositions on the behavior of individuals involved in the state's operation and making up the society. The practical outlook will then be turned inwards to Islamists lawmaking activities and help to understand how Islamists can reach compromise with other forces by playing between different legal categories.

I. What do "Islamic" norms mean?

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[7] Gianluca Parolin's works stand as an exception. Parolin reflects on the meaning of dispositions of the 2012 Constitution in relation to the Islamic normative tradition and the Egyptian modern constitutional law and practice. See for instance Gianluca Parolin, "Shall We Ask Al-Azhar? Maybe Not," *Middle East Law and Governance*, 7, no. 2, (2015), 212–235;

[8] Ifeoma Laura, Owosuyi, "Participatory Constitution-Making and Why It Matters: A Review of the Egyptian Experience," *South African Journal of International Affairs*, 23, no. 2 (2016), 201–223; Tereza Jermanova, "Before Constitution-Making: the Struggle for Constitution-Making Design in Post-Revolutionary Egypt," *Acta Politica*, 2019.

[9] Farida Ayari, "Ennahda Movement in Power: A Long Path to Democracy," *Contemporary Review of the Middle East (Online)*, 2, no. 1-2 (2015), 135–142.

[10] Rory McCarthy, "Protecting the Sacred: Tunisia's Islamist Movement Ennahdha and the Challenge of Free Speech," *British Journal of Middle Eastern Studies*, 42, no. 4 (2015), 447–464.

[11] Sharan Grewal, "From Islamists to Muslim Democrats: The Case of Tunisia's Ennahda," *The American Political Science Review*, 114, no. 2 (2020), 519–535.

[12] Thierry Desrues and Irene Fernández Molina, "L'Expérience Gouvernementale Du Parti De La Justice Et Du Développement : Les Islamistes Au Pouvoir ?" *L'Année Du Maghreb*, 2013, 345–365.

According to some authors of legal theory, legal norms can be distinguished in terms of their degree of precision regarding what behavior they expect from individuals, a dynamic which can be called the "normative force."[13] The evaluation of this precision can be understood in a continuum, in which the more specified a legal norm is, the more likely it is to be called a rule, and the less specified a legal norm is, the more likely it is to be called a principle.

A) Principles

For the purpose of this paper, the nature of the distinction will not be so much about the structural logic of norms and their degree of textual precision but rather about their empirical function.[14] Rules drive the behavior of individuals, while principles need to be specified into rules to do so. It does not mean that principles necessarily have a less normative force than rules but that it is more diffuse. Their function is to justify the adoption or rejection of rules, as they exist as argumentative resources to make claims about their validity.[15] The legal strength of these claims is usually backed up by the fact that principles tend to be attached to constitutions, which are deemed of the highest legal value following the paradigm of the hierarchy of norms.

An example of principle can be found in the Article 1 of the 2014 Tunisian Constitution which states that "Tunisia is a free, independent, sovereign state; its religion is Islam." Islam's definition as a state's religion can be viewed as a principle describing the legal system. Presented as a concession to Ennahdha in exchange of the renouncement to the inscription of a Shariah clause, Article 1 elicited many controversies within the constituent assembly (NCA) and the wider society. Rather than being tied to a specific agenda of political change that would necessarily bring about this article, the concerns expressed about Article 1 were better understood as being about the vast interpretative potential of the text in relation to the ideological interests of Political Islam.[16] Its detractors worried it could be used as an argumentative resource to push for "Islamisation" in all matters regulated by the state's law. Article 1 was then effectively used by Ennahdha and non-partisan Islamic organisations, though not in a positive way to advocate for legal change but rather in a negative way to oppose it. The conflict occurred after the release of the 'Commission des libertés individuelles et de l'égalité (Colibe) report in 2018. Colibe was a

[13] Frederick Schauer understands the difference between standards, named in this paper "principles", and rules as such: "The first group…is broad, vague, general, and imprecise. The second group…is detailed, specific, concrete, and determinate." Frederick Schauer, *Thinking like a Lawyer: a New Introduction to Legal Reasoning*, (Harvard : Harvard University Press, 2009), 189.

[14] This is for instance the position of Robert Alexy embodied in his distinction of principles as "optimizing commands" and rules as "definite commands". Robert Alexy, transl. Juan Rivers, *A Theory of Constitutional Rights*, (Oxford: Oxford University Press, 2002), 46-47.

[15] Juan Etcheverry, "An Approach to Legal Principles Based on Their Justifying Function," *The Canadian Journal of Law and Jurisprudence*, 32, no. 2 (2019), 321–342. With regards to 'validity' it relates to the distinction made by Ronald Dworkin between abstract and concrete rights, according to which the latter offer arguments for the former. Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978), 90-93.

[16] See for instance Jean-Philippe Bras, "Un État civil peut-il être religieux?", *Pouvoirs*, 156, no. 1 (2016), 55-70.

consultative body instituted a year before by then president Caïd Essebsi in order to provide recommendations for conforming the Tunisian legal system with constitutional and international standards on human rights. The document contained proposals such as the depenalisation of homosexuality, the suppression of dowry for wedding and others which will be addressed below, a set of prospective rules which were preemptively contested by Islamists on the ground of their illegality with the Article 1 of the Constitution.[17]

B) Rules

According to a classification set by the legal theorist Herbert Hart, rules can be distinguished according to their object. There are the primary rules aimed at individuals making-up the society. Then there are the secondary rules concerning the actors of the legal system, which specify "the ways in which the primary rules (or principles) may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined".[18] In brief, rules are either about the essential purpose of a legal system, social control, or what it takes to make the legal system work.

Primary rules

According to Hart, primary legal rules are aimed at individuals and entities making up the society and can be viewed as setting obligations upon them. They operate through a combination between a prescriptive component designed at driving one's behavior, and a sanction's component specifying the consequences of non-compliance. Hart conceptualises them, from the viewpoint of actors, as "general orders backed by a threat."[19] From a more exterior and logical viewpoint, Hans Kelsen tends to consider them as hypothetical judgments in the form of "if A then B."[20] To better understand this, one can take the example of a rule punishing murder with a life sentence. It sets an obligation to not kill, which could be expressed as either "do not kill otherwise you will go to jail for life" or "if you kill, you will go to jail for life". In this framework, Islamist parties' policies, as these of any actors, are viewed as either imposing obligations upon society or relieving it from them, which might be understood, in this last instance, as providing rights. Both qualifications of "obligations" and "rights" depend of course upon the analysis of the state of the law prior to rule adoption, as they are rooted in how the new rules modify it. To find numerous instances of primary rules adopted by an Islamist party, one could turn to Turkey where the Justice and Development Party has been ruling for two decades. Some of its policies potentially tied to an Islamic ethos have added obligations, for

[17] Alia Gana, and Ester Sigillò, "Les Mobilisations Contre Le Rapport Sur Les Libertés Individuelles Et l'Égalité (COLIBE) : Vers Une Spécialisation Du Parti Ennahdha Dans l'Action Partisane ?" *L'année Du Maghreb*, 21, 2019, 377–383.
[18] Herbert Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1994), 94.
[19] Herbert Hart, *The Concept of Law*, 25.
[20] Hans Kelsen transl Paulson and Paulson, *Introduction to the Problems of Legal Theory*, (Oxford: Clarendon Press, 1992), 23.

instance on shopkeepers to not sell alcohol at night or near mosques.[21] Conversely, others have eased the level of obligations bearing on the society, such as the string of decisions which gave women the right the wear the headscarves in public institutions.[22]

Secondary rules

The secondary rules category can be of use to shed some light on the debates around the role of Islam in the Egyptian constituent committee that drafted the 25 December 2012 Constitution in force during the presidency of the Muslim Brotherhood's Mohamed Morsi. Disagreements over this topic were the main justifications used by non-Islamists to resign from an institution where Islamists represented over two-thirds of the seats.[23] I will look at three articles and highlight some of their stakes by using the three sub-types of secondary rules theorised by Hart: 1) rules of change which deal about how legal norms should be introduced, modified and repelled; 2) rules of adjudication which concern how to determine, in a specific instance, whether a rule has been violated and how the sanction should be applied; 3) rules of recognition which engulf rules enabling to identify whether a given norm belongs to the legal system or not.[24]

Article 4 of the 2012 Constitution conferred a consultative role to the Al-Azhar University's Council of Senior Ulama in matters relating to Islamic Shariah. It could be viewed as an issue pertaining to rules of change, as the main stake attached to the debate around this article was whether or not all draft legislation should be handed over to Al-Azhar to check conformity with Shariah prior to adoption.[25] Article 81's connection with Islam was less straightforward, as it stated that individual "rights and freedoms are to be exercised in a way that is consistent with the dispositions set out in the constitutional chapter on the foundations of state and society". Nonetheless, the tie was assumed by participants to the debate on the grounds that this chapter contained Article 2 which mentioned that "principles of Shariah were the basis of legislation'' in the Egyptian legal system. Concerns of non-Islamists could be framed in terms of rules of adjudication in as much as it related to the fear that Article 81 would drive judges to make Shariah prevail over individual rights in the hypothesis of a litigation where each application would lead to different solutions.[26] The last article was 219 which defined what encompassed the principles of Shariah referred in article 2 through a terminology specific to the Islamic normative tradition.[27] The issue could be here understood in terms of rules of recognition, in the sense that it related to

[21] BBC, May 24, 2013, https://www.bbc.co.uk/news/world-europe-22653173.
[22] BBC, February 22, 2017, https://www.bbc.co.uk/news/world-europe-39053064.
[23] See Alexis Blouët, *Le pouvoir pré-constituant : analyse conceptuelle et empirique du processus constitutionnel égyptien après la révolution du 25 janvier 2011*, (Paris: Institut francophone pour la justice et la démocratie/LGDJ, 2019), 305-306.
[24] Herbert Hart, *The Concept of Law*, 91-94.
[25] Gianluca Parolin, "Shall We Ask Al-Azhar? Maybe Not".
[26] Alexis Blouët, *Le pouvoir pré-constituant : analyse conceptuelle et empirique du processus constitutionnel égyptien après la révolution du 25 janvier 2011,* 314.
[27] "The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."

which norms of "Islamic law" should be recognised as legal positive rules in the Egyptian legal system.[28]

One must also bear in mind that the audience of secondary rules is not necessarily state officials and institutions. Indeed, in Hart's perspective, lawmaking is not the monopoly of the state and extends to private groups and individuals. They can also enact binding primary rules on each other through, for instance, wills, contracts, transfers of property, and other voluntarily created structures of rights and obligations.[29] Therefore, rules that must respect individuals and private entities when they create, alter, or terminate such legal institutions can also be considered as secondary rules, and more accurately rules of change.

II. Compromise as a play with norms

These categories of legal theory do not only have a static value; their value is not exclusively in better understanding the legal texts Political Islam's parties adopt or push. They can also help to highlight their practices when they engage in the politics of their production. This part will focus on Ennahdha. Since its arrival to positions of state's power in 2011, the party had to compose with actors not necessarily sharing its commitment to the Islamic reference. Thus, Ennahdha existed in the official state's infrastructure, by engaging in coalition with "secular" parties[30] and figures[31] or composing with state bodies developing a liberal agenda, such as the aforementioned Colibe. Ennahdha had also to interact with groups operating from outside the precinct of the state such as civil society organisations and international NGO's in a context of Tunisia's reliance on foreign aid.[32] All of that drove Ennahdha to compromise or at least to adopt the posture of compromise expected by the configuration of power. The notion of compromise is here understood as adjusting an initial policy preference in order to accommodate another actor's view.[33] This part will look at two proposals that demonstrate such compromise when tied to matters connected to the Islamic normative tradition and analyse them as a play with norms of different categories. In both instances, Ennahdha defended the maintenance of "Islamic" primary rules while accepting the potential jeopardy to their normative force, by accepting or proposing to accept the addition of a principle or of a primary rule.

A) The right to life and the preservation of the death penalty

[28] Gianluca Parolin, "(Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition", *NYU School of Law: Public Law Research Paper,* no. 13-15, 2013.
[29] Herbert Hart, *The Concept of Law*, 96.
[30] There was the "Troika" with the center-left parties Ettakatol and CPR, which lasted from 2012 to 2014. Then, Ennahdha accepted to form a coalition with other prominent parties of the political landscape, including the assumed secular and Bourguibist Nidaa Tounes.
[31] Ennahdha took part in almost all coalition government during most of Béji Caïd Essebsi's presidency.
[32] The inclusion of non-state actors of this type was exemplified in the adoption process of the law on women's protection in 2018. The law has been drafted in concertation with Tunisian women's right organizations and the U.N, which was at the onset of the project in 2008.
[33] Markus Kornprobst, *Irredentism in European Politics*, (Cambridge: Cambridge University Press, 2008), 45-48 and Eric Beerbohm, "The problems of clean hands: Negotiated compromise in lawmaking", *Yearbook of the American Society for Political and Legal Philosophy*, 2018, 1-53.

The issue of the death penalty was not among the most vocally contested within the Tunisian constituent assembly, unlike others such as blasphemy, gender equality or the status of the president of the Republic.[34] Perhaps, because Tunisian authorities have not executed anyone since 1990 following a moratorium announced in 1991.[35] Despite that, death sentences are still regularly pronounced by Tunisian courts, as demonstrated in the court proceedings of the persons condemned for the 2015 attack on a Tunisian Presidential guard bus. Judges can draw on dozens of occurrences in the legal texts where the death penalty is sanctioned for several political attacks, crimes involving death or military faults in the context of war.[36] Against this context, to avoid that the fate of condemned individuals rely on the mere willingness of governments to extend or not the moratory, independent MPs and some of the Democratic Bloc and Alliance attempted at constitutionalising abolition.[37] The move evoked a bill proposed in 2008 by a coalition of opposition MPs in the pre-revolutionnary parliament, which then failed to be adopted.[38]

Within the constituent assembly, the abolition was almost unanimously opposed by Ennahdha.[39] It could be understood on the ground that the capital punishment is present in the Islamic normative tradition, although it tends to be tied with very specific factual, evidence and procedural standards and was in fact very rarely instituted in the pre-modern Islamic period.[40] The Islamic reference was indeed used by Rachid Ghannouchi to justify Ennahdha's position.[41] He drew on other argumentative registers such as those of nature, retributive justice or social order: "Death penalty is a natural law, a soul for a soul. The one who threatens other's life must know that his life is also threatened."[42]

The debate was settled in the constituent assembly by a unanimous agreement on Article 22 which mentioned that "the right to life is sacred and cannot be prejudiced". In this context, the right to life stood as a principle whose tie to the death penalty abolition was only virtual. On the one hand, the right to life could be logically understood as setting a negative obligation on states to not kill individuals. Legal doctrine has traditionally associated it with the exclusion of the death penalty and it was for that purpose that the lawyers which drafted the Moroccan constitutional review of 2011 added it in the text.[43] On the other hand, the Article 22 contained an

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[34] Tereza Jermanova, *Constitution-making and Democratization: A Comparative Analysis of Tunisia and Egypt after the 2010/11 Uprisings*, (PhD dissertation: University of Warwick, 2018), 171-183.

[35] World Coalition against Death Penalty, Tunisia, http://www.worldcoalition.org/fr/The-abolition-of-the-death-penalty-in-Tunisia-a-fight-against-torture.html.

[36] Tunisian criminal code and Tunisian code of military justice.

[37] Bawsala, https://majles.marsad.tn/fr/vote/52cef37f12bdaa77218c8812.

[38] La peine de mort, Tunisia, https://www.peinedemort.org/document/2878/Tunisie-25-deputes-presentent-un-projet-de-loi-pour-l-abolition-la-peine-de-mort.

[39] One must note that two Mps of Ennahdha also supported the abolition, Hajer Mnifi and Badreddine Abdelkafi. Mp's from different groups were also opposed to the abolition, including among Ettakatol and the Democratic Transition Bloc.

[40] See Jonathan Brown, "Stoning and Hand Cutting: Understanding the Hudud and Shariah in Islam", *Yaqueen Institute,* 2017, https://yaqeeninstitute.org/jonathan-brown/stoning-and-hand-cutting-understanding-the-hudud-and-the-shariah-in-islam/.

[41] Islam Times, June 4, 2012, https://www.islamtimes.org/ar/news/168057.

[42] France 24, March 30, 2013.

[43] Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter, *The Right to Life*, (Boston: Martinus Nijhoff Publishers, 2010). Despite this Inclusion In the text, it has not been abolished yet.

exception clause that disposed that the right to life could be prejudiced in "exceptional cases regulated by law". This disposition reflects the fact that obligations on states to not kill individuals suffer practical exceptions in virtually all legal systems. The notion of legitimate defense which entitles one to kill under the justification of protecting one's life or those of others, is a strong example of such an exception. Furthermore, the right to life has been increasingly associated to other issues connected to health services or animal rights, a link that dilutes the association between Article 22 and the abolition of death penalty.[44]

Article 22 could thus be viewed, in Cass Sunstein's words, as an "incompletely specified agreement" on the death penalty within the constituent assembly which aimed at "concealing the fact of disagreement around the issue."[45] From a dynamic viewpoint, it was an accord to gamble on death penalty's presence within the Tunisian legal system, to be settled by the future institutional political configuration. If abolitionists were to prevail, the principle of right to life would offer them an argumentative resource to ground their abolition's initiative legally, an opportunity later seized by the Colibe in its 2018 report.[46] From Ennahdha's viewpoint, the addition of the principle enabled them to ensure the immediate maintenance of the death penalty at the expense of jeopardising its normative force by widening the structure of opportunity to abolish it.

B) Allowing liberal equality in inheritance to preserve state's inequality

The Colibe not only pushed for abolition of the death penalty, in fact its most resounding initiative lay in the field of family law. The body recommended the abrogation of a rule of succession objectively disadvantaging women towards men. This primary rule sets an obligation to persons handling the distribution of successions to give daughters half of what sons receive of their father's property.[47] It was incorporated in the 1957 Code of Personal Status drafted and enacted at the beginning of Habib Bourguiba's era. In spite of Bourguiba's reputation of being a staunch secular, the Code contained many norms that also belonged to the Islamic normative tradition. It reflected the fact that this code was not presented as anti-religious, but on the contrary as embodying a modernist version of Islam.[48] The rule studied here is part of the Islamic normative tradition where it is usually presented as derived from a verse of the Surat an-Nisa in the Koran : "God commands in the sharing of your possessions between your children to allot to the male a portion double to this of the female".

The Colibe's initiative was in fact not new in the Tunisian political landscape. In May 2016, 27 MPs had proposed a bill repelling this succession rule but it was not

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[44] The syntagma "right to life" is usually used by anti-abortionists to defend their argument, where the life in question is that of the "baby to be born". Ennahdha is also quite skeptical about abortion but debates in the constituent assembly seemed unrelated with the issue of restrictions to abortion. Indeed, the Constitution contained an article designed at prohibiting authorities to withdraw rights to women. Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter, *The Right to Life*.

[45] Cass Sunstein, "Incompletely Theorized Agreements," *Harvard Law Review* 108, no. 7 (1995): 1739.

[46] Report of the committee of individual freedoms and equality, June 1, 2018, 56.

[47] Chapter 5 of the Tunisian Personal Status Code.

[48] Franck Frégosi et Malika Zeghal, " Religion et politique au Maghreb : les exemples tunisien et marocain " *IFRI,* Policy Paper 11, 2.

even transmitted for vote in the Parliament's plenary session.[49] The Colibe's report gave a new strength to the proposition as it was picked up by the president of the Republic Béji Caïd Essebsi, who turned it into a bill proposal of its own in August 2018. The project is currently halted and its examination within the Committee of Social Affairs of the Parliament has not yet been completed. This is likely due to Caïd Essebsi' replacement, new president, Kaïs Saïed, who has clearly expressed his opposition to the reform. However, in the meantime, Ennahdha had to take a public position about the process. The party first rejected the proposition outright through a declaration of its Shura Council.[50] It then came to adopt a more accommodating stance expressed by the MP Naoufal Jammali who stated that: "We are ready to discuss about the question of succession not around the angle of gender equality but rather around the choice of every Tunisians to deal with its own succession."[51]

Jammali hinted at the possibility of allowing individuals to derogate to the discriminating rule by will. It would allow fathers to share their succession as they want and within this increased liberty to eventually attribute an equal share to sons and daughters. Like in Moroccan law, the rule of half for daughters would become subsidiary, in the sense that it would apply only insofar as the father has not planned before their death how their properties would be distributed between his children.[52] From a theoretical perspective, Jammali proposed to modify secondary rules of succession, rules of change, by playing on the authority to decide over the obligations that must follow people handling successions.[53] Before the proposition, individuals could not overstep the state's will in the matter of distribution of properties between sons and daughters, and with this proposition they have the authority to do so and in this framework to go beyond the rule allocating half the share for daughters. Such a compromise would allow the legal system to preserve an Islamic inspired primary rule, but also, through a secondary rule, to accommodate the will of its opponents by providing opportunities to circumvent it.

Conclusion

The rise of Islamist parties to positions of state power after the Arab Spring has driven a reorientation of the literature on the topic. It has mainly pushed it to evaluate how this new configuration could bring different answers to questions already posed. What is the ideological identity of Islamists? How do the entities representing the trend organize, especially in relation to the religious field?[54] However, this new configuration also asks new question in and of itself: what policies do Islamists promote within the state apparatus? How do they engage in the politics of policy-making? This paper suggests that law could be a part of the equation. Because it is a

[49] Kapitalis, May 9, 2016.
[50] Declaration of the 26th session of Ennahda's Shura Council, August 26, 2018.
[51] Middle East Eye, June 8, 2019.
[52] Chapter 6 of the Tunisian Family Code.
[53] Ibid.
[54] Eric Trager, *Arab Fall : How the Muslim Brotherhood Won and Lost Egypt in 891 Days*, (Washington, DC: Georgetown University Press, 2016); Ester Sigillo, "Ennahdha and the Expansion of Tunisian Islamic Associations: Claiming Political Islam beyond the Partisan Sphere", *L'Année du Maghreb*, 21, 2020: 113-129.

prominent technology of policy-making, law can stand as an entry point to better grasp Islamic parties' involvement and maneuvers in that field. Law is not here understood as the rules of the game of politics which these actors follow in a causal relation. It is understood more anthropologically as a malleable meta-structure of the state's power, with which Islamists, as any actors would, play, while they occupy positions of state power. However, modern law is not a purely transparent paradigm, it informs and adjusts the significance of the Islamic normative tradition, used by Islamists in their policy proposals.[55] As a result, the practical range of these proposals can be related to how legal systems work internally and towards the population. They can also be understood as potentially part of a larger national system of norms where their force is necessarily diluted by that of other norms.

[55] Baudouin Dupret, *What is the Sharia?*, (London: Hirst, 2018).